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IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

No. 197.

THE UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, *Appellants*,

v.

CAROLINA FREIGHT CARRIERS CORPORATION, *Appellee*.

Appeal from the District Court of the United States for the Western District of North Carolina.

BRIEF IN BEHALF OF CAROLINA FREIGHT CARRIERS CORPORATION.

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January 6, 1942.

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BRIEF IN BEHALF OF CAROLINA FREIGHT CARRIERS CORPORATION.

OPINION OF THE COURT BELOW.

The opinion of the District Court of the United States for the Western District of North Carolina (R. 25-34) is reported in 38 Fed. Supp. 549, and the report of the Interstate Commerce Commission (R. 6-11), hereinafter called the Commission, is found in 24 M. C. C. 305.

JURISDICTION OF THIS COURT.

In its brief herein the Commission has correctly set forth the grounds on which the jurisdiction of this Court is invoked, and, in the interest of brevity, we shall not repeat them here.

STATEMENT OF THE CASE.

At pages 2 to 4 and 4 to 12 of its brief herein the Commission has set forth what it assumes to be the "questions presented" and the facts. Although its resumé of the facts is in large part correct, the whole is fashioned in such manner, particularly by what it omits, that we are apprehensive that at the very outset an incorrect impression may be left with this Court. We deem it no more than prudent, therefore, to place at the disposal of the Court what we believe to be a more complete and more illuminating statement of the facts here to be considered and our view of the questions presented. This we shall do in the briefest possible compass.

This proceeding grows out of an application seasonably filed with the Commission by appellee's predecessor, the Mauney Transfer Company, Inc.,[1] under the so-called "grandfather" clause[2] of section 206(a) of the Motor Carrier Act, 1935 [U. S. Code, Sup. I, title 49, sec. 306], hereinafter usually called the act. The application was docketed

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[1] Substitution of the Carolina Freight Carriers Corporation, appellee here, in lieu of the Mauney Transfer Company, Inc., as applicant, was approved by the Commission on March 8, 1937, in its proceeding numbered MC-FC-1256. Reference hereinafter to Carolina Freight Carriers Corporation or to appellee will be understood to include its predecessor where the text requires such inclusion.

[2] The relevant portions of the governing statute are quoted in the appendix set forth at pages 52 to 58 of the brief of the Commission herein, and we shall not burden the Court with their repetition. We take occasion, however, to point out that section 210 (U. S. Code, Sup. I, title 49, sec. 310), mentioned in section 206(a), has to do with dual operation as both common and contract carrier and therefore has no bearing on the instant case. Neither do the questions of bona fides, seasonal operations, or interruptions of service, likewise mentioned in section 206(a), have any such bearing. We emphasize this question of bona fides because the brief of the Interstate Commerce Commission, unintentionally we are confident, might well leave the impression at page 6 that the application was largely denied because appellee's operations were mala fide in the opprobrious sense in which that term is used in *McDonald v. Thompson*, 305 U. S. 263, and *Slagle Contract Carrier Application*, 2 M. C. C. 127. Such, we repeat, was not the case.

by the Commission as No. MC-2253, Carolina Freight Carriers Corporation Common Carrier Application. The Mauney Transfer Company, Inc., thereby sought a certificate authorizing operation as a common carrier by motor vehicle in interstate or foreign commerce of general commodities (except commodities of unusual value, those in bulk, those requiring special equipment such as tank or refrigerator trucks, those injurious to other lading, livestock, automobiles, and high explosives) (R. 1) between all points in South Carolina, North Carolina, Delaware, New Jersey, Connecticut, Rhode Island, Massachusetts, those in Virginia east of and including the Shenandoah Valley, those in Maryland and Pennsylvania on and east of U. S. Highway 11,[3] and those in New York east of Binghamton and south of Albany, over irregular routes; and between Cherryville, N. C., and Boston, Mass., over a regular route[4] through Henderson, N. C., Richmond, Va., Baltimore, Md., Philadelphia, Pa., and New York, N. Y. (R. 7). Thus it will be observed that appellee, consistently with its holding out, *itself* restricted its prayer to traffic to the carriage of which its equipment was adopted. It did not seek, as the United States implies at page 18 of its brief, to poach on the preserves of the so-called "specialty" haulers.

The application was assigned for formal hearing before an examiner; hearing was held, at which, incidentally, no evidence was offered in opposition to the prayer of the application (R. 7; 41-155); exceptions were duly filed to the examiner's recommended order (R. 7); and on July 10, 1940, Division 5 of the Commission made the following findings (R. 10-11):

> We find that applicant's predecessor in interest was on June 1, 1935, and continuously since it and its pre-

[3] U. S. Highway 11 extends generally northeastward from Winchester, Va., through Hagerstown, Md., and Chambersburg, Harrisburg, Wilkes-Barre, and Scranton, Pa., to Binghamton, N. Y.

[4] As shown by the evidence, however, all of applicant's operations have been over irregular routes (R. 8, 154).

decessor have been, in bona fide operation as a common carrier by motor vehicle, in interstate or foreign commerce (1) of cotton yarn from all points in Gaston, Lincoln, Cleveland, Rutherford, McDowell, Burke, Catawba, Alexander, Iredell, Rowan, Davidson, and Davie Counties, N. C., to Hagerstown, Md., New York, N. Y., Pawtucket and Providence, R. I., all points in Pennsylvania on and east of U. S. Highway 11, and points in Middlesex, Union, Essex, Hudson, Passaic, Bergen, Somerset, and Morris Counties, N. J., (2) of asbestos textile products from Charlotte, N. C., to Philadelphia and North Wales, Pa., Trenton, Newark, Passaic, and Paterson, N. J., New York, N. Y., Middletown, Conn., Providence and Pawtucket, R. I., and Boston and Hudson, Mass., (3) of supplies and materials used in the manufacture of asbestos textile products from Harrison and Perth Amboy, N. J., to Charlotte, N. C., and empty spools and boxes in the reverse direction, (4) of petroleum products in containers from Sewaren, N. J., and Marcus Hook, Pa., to Columbia and Greenville, S. C., and to all points in North Carolina, (5) of linoleum from Paulsboro, N. J., Marcus Hook, Pa., and East Walpole, Mass., to points in North Carolina and to Spartanburg and Greenville, S. C., (6) of canned goods from Baltimore, Md., to Shelby, N. C. (7) of beer and ale from Newark, N. J., to Gastonia and Wadesboro, N. C., and (8) of roofing and screen wire from York, Pa., to all points in North Carolina, all over irregular routes.

Except in the unimportant respects just shown, the application was ordered denied, effective August 31, 1940 (R. 11). After the effective date had been postponed at the request of appellee, a petition for reconsideration was filed by appellee on September 11, 1940, which, however, was denied by the Commission on November 4, 1940 (R. 15). Having thus exhausted its remedies before the Commission, appellee brought suit in the lower court (R. 1-6).

The hearing before the court below was held on January 8, 1941; appellee introduced a copy of the testimony and ex-

hibits[3] received by the Commission (R. 40); this evidence is a part of the record here (R. 40-178); and on April 5, 1941, the court below, having previously granted an interlocutory injunction (R. 12-13), rendered its opinion (R. 22-34) that by limiting appellee to the precise points served and specific commodities transported both prior and subsequently to June 1, 1935, and by predicating its opinion on the supposed need of the regular-route common carriers for protection against the apprehended encroachments of appellee and other irregular-route common carriers in like position, the Commission had arbitrarily and unreasonably transcended its powers. Thereupon the lower court set aside and annulled the Commission's order and ordered the cause remanded to the Commission for further proceedings not inconsistent with the opinion of the court.

The briefs for the Government and the Commission would leave the impression with this Court that applicant specialized in the transportation of cotton yarn to the virtual exclusion of all other traffic. That such is far from correct is demonstrated, we maintain, by the following summary of the evidence. Appellee began business in 1931. Its three trucks (R. 77) had increased to eight by June 1, 1935 (R. 26; 62), and to seventeen by the day of the hearing before

[3]Among the exhibits so introduced was Exhibit No. 2, appellee's certificate of registration under the code of fair competition (R. 163-6). By their reference to this certificate (page 4 of the brief of the United States and page 7 of the Commission's brief) appellants would seemingly imply that it is to be accepted as delineating the scope of appellee's operations at that time. In passing, we take occasion, therefore, to point out that it is not urged by any party that appellee was ever a contract carrier (R. 8); that no New England State is mentioned in the certificate, even though it is clearly shown of record that appellee did transport traffic to and from New England; and that, since appellee did not operate empty southbound, it is quite impossible that 90 per cent of its traffic consisted of textile products. On its very face the certificate is defective. Motor carriers quite generally looked upon the national industrial recovery act as something to be tolerated, and no more, and they were notoriously careless in supplying the information for insertion in these certificates.

the Commission's examiner, October 28, 1938 (R. 46). Because all the records of shipments transported by appellee had not been preserved (R. 8; 137; 141), it became necessary at the hearing to supplement the exhibits made up from actual billing by the testimony of appellee's employees and of shipper witnesses (R. 8; 43; 56; 75; 92; 98; 114; 125). Within the territory throughout which appellee sought to do business it hauled everything it could get; it was always seeking more business (R. 60). It hauled everything offered to it (R. 60). It never refused to haul shipments tendered to it (R. 97).

Not only did appellee itself seek business (R. 136), but it employed the services of freight brokers (R. 126; 130-40), who solicited a varied assortment of freight (R. 127-139). One of the partners in this brokerage concern replied in the affrmative to an inquiry whether he distributed to appellee for transportation "new and different commodities along with the growth of the business" (R. 139). This brokerage concern "broadened out and covered quite a radius of territory" in its solicitation endeavors (R. 136). The success which attended appellee's efforts to obtain diversified traffic prior to the "grandfather" date is attested by Exhibits 1 and 3 (R. 155-159; 166).

Since appellee maintained its headquarters in the heart of the Piedmont area of North Carolina, it was only natural that its northbound traffic should consist preponderantly of cotton textile products, but we repeat for emphasis that it did not confine its efforts to those products, that it did in fact transport other commodities northbound and southbound, and that it served many, many points which the Commission has refused it authority to continue to serve. All this will be found in detail in a subsequent chapter, *infra*, pages 24 to 28.

It is enlightening in this regard that the testimony discloses that such carriage is wholly consistent with appellee's general holding out and method of carriage. Thus, for example, witness Nicholson, formerly traffic manager for a producer of pneumatic tires in Charlotte (R. 43-4),

testified that he expected appellee to transport his company's outbound products to whatever points he designated along the eastern seaboard and to bring back shipments to Charlotte from any points in those States from which he drew supplies (R. 44) and that in response to appellee's solicitation he gave it such shipments as he had (R. 45). Witness Griffis, traffic manager for a producer of asbestos products (R. 75; 82), testified that his company shipped generally along the eastern seaboard and into the New England States (R. 77); that his shipments were destined "all along the Atlantic Seaboard" (R. 81); that the shipments usually were made up of consolidated small lots destined to a number of points (R. 81); that his outbound shipments consisted of "asbestos textile products, principally cloth, yarn, packings, tapes, tubings, and there are many other products there" (R. 82); and that he felt perfectly free to call on appellee to transport these various commodities to points which it had not previously served in this seaboard area "because they [appellee] solicited our business on the basis that they were hauling everything and were prepared to haul everything that anybody cared to offer them for transportation" (R. 82) and "represented themselves as wanting to do it, as well as being prepared in the way of equipment and regularly covering that territory * * * along the Atlantic Seaboard to New York and into the New England States" (R. 83). Witness Griffis testified further that "I suppose that every week there were different shipping points"; that "We would always take a complete load of shipments regardless of points destined within that territory, and give them all the shipments"; and that today "there are about three hundred shipping points that are being served by truck" (R. 84). The Court will note that the Commission authorized appellee to transport these asbestos textile products to a total of *twelve* destinations (R. 11).

QUESTIONS PRESENTED.

As may be readily gathered from the foregoing, then, the principal question presented is not, as the Government's brief suggests at page 2, whether the Commission gave due regard to appellee's holding out, if, indeed, it was bound to consider it at all (see footnote 6 at page 12 of the Government's brief). Neither is it, as the Commission's brief suggests at pages 2 to 4 inclusive, whether the finding of the Commission rests on a foundation of substantial evidence. Instead, the principal question is whether the Commission transcended its powers in finding, under the said "grandfather" clause, that appellee's operations are to be restricted to the carriage of no more than each of those commodities which it transported both prior and subsequently to June 1, 1935, and these only to and from the precise[6]

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[6] It is curious that in No. 110, this Term, *Alton Railroad Company* v. *United States*, which deals with the validity of an order of the Commission under this same "grandfather" clause authorizing applicant in the proceeding entitled No. MC-48654, *Fleming Common Carrier Application*, 8 M. C. C. 469, to continue operations as a common carrier in driveaway service of new automotive vehicles, finished and unfinished, and new automotive chassis, from Detroit, Mich., to all points in Alabama, Arkansas, California, Georgia, Kentucky, North Carolina, Oregon, South Carolina, Tennessee, Texas, and Washington, the joint brief in behalf of the United States and the Commission states on page 3 thereof that one of the questions presented to this Court is "Whether the Commission, in authorizing the operations to all points in a State on evidence of actual shipments to a few points only, misconstrued the statute," and then proceeds on page 43 thereof to set forth the following:

> The fact that, as to the points noted and other points, the shipments carried by him were few and separated, or varying in frequency, could not be taken as establishing that Fleming was no longer bona fide engaged in transportation to those points, if that was not the reasonable conclusion to be drawn therefrom, in view of the marketing characteristics of the industry and the fact that his service was not one for which there was steady demand. The fact, too, that Fleming's operations, as evidenced by shipments transported prior to the "grandfather" date, were shown to have been conducted to certain points in a State only, could not be taken to establish that the

points between which it transported each of them during that time, notwithstanding appellee's holding out to transport general commodities within a designated territory, notwithstanding its fitness, willingness, and ability so to operate, and notwithstanding that regularly throughout the years it operated consistently with that holding out.

Subordinate questions presented are:

(1) Whether the Commission transcended its powers in failing to consider facts and circumstances of record which ought to have been considered.

(2) Whether the Commission, in deference to the supposed needs of regular-route common carriers, transcended its powers in basing its decision on considerations which have no relevancy in a proceeding under the said "grandfather" clause.

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operations he was bona fide engaged in were confined to those points, *if such a conclusion would be in conflict with the real character of his operations* made necessary by the marketing characteristics of the industry whose products he moved. (Italics supplied.)

Moreover, at page 49 of the same joint brief the following language is found:

> • • • we do not think that the "grandfather" clause can properly be interpreted as freezing a carrier's operations fast to the precise trips in fact made by him prior to the administrative hearing before the Commission; such a result is in conflict with even the literal language of the clause; that refers to operation on and since June 1, 1935, and there is every probability that no carrier will have made after the "grandfather" date the identical trips made approximately at that date.

Despite the strenuous efforts of the Government at pages 24 and 25 of its brief, we are quite unable to reconcile the position taken by the Government and the Commission in the cited case with that which they take in the instant case; we submit that they are wholly inconsistent.

ARGUMENT.

Plan of Brief.

We appreciate, of course, that, however irreparable the injury which appellee would suffer from the decision of the Commission, we must show further that the lower court properly found prejudicial error in that decision. This it will be our purpose to do. To this end our treatment of the case divides itself naturally, just as it did in the court below, into three parts, namely, (a) that in limiting appellee to a very few commodities between a very few points, the Commission erred as a matter of law in the construction which it placed upon the "grandfather" clause and upon the definition[7] of "common carrier by motor vehicle" as set forth in section 203(a)(14) of the act (U. S. Code, Sup. I, title 49, sec. 303); (b) that it erred as a matter of law in failing to consider facts and circumstances of record which ought to have been considered; and (c) that it erred as a matter of law in going beyond the record to build its decision on a foundation of considerations which have no relevancy. We shall discuss these three, with their many ramifications, in the order just shown, and close our brief with a discussion of the more important of what we hold to be the unsound contentions raised by appellants in their respective briefs.

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[7] For the convenience of the Court we repeat below the pertinent portion of that definition:

> "The term 'common carrier by motor vehicle' means any person who or which undertakes * * * to transport * * * property, or any class or classes of property, for the general public in interstate or foreign commerce by motor vehicle for compensation, whether over regular or irregular routes * * *."

There is obviously no significance to be attached to the fact that in 1940 the Congress amended section 203(a)(14) of the act to read:

> "The term 'common carrier by motor vehicle' means any person which holds itself out to the general public to engage in the transportation by motor vehicle in interstate or foreign commerce of * * * property or any class or classes thereof for compensation, whether over regular or irregular routes, * * *." Section 18(a), Act of September 18, 1940, c. 722, 54 Stat. 920.

The Commission Erred as a Matter of Law in the Construction which it Placed Upon the Definition of "Common Carrier by Motor Vehicle."

At page 309 of its report (R. 10) the Commission states that "Section 203(a)(14) of the act contemplates that a common carrier may transport only a 'class or classes of property,' and we have found in numerous cases that the authority issued under the 'grandfather' clauses of sections 206(a) and 209(a) of the act *should reflect any limitation in the undertaking* of common or contract carriers *as indicated by the service actually rendered* on and since the statutory dates" (emphasis ours). In making this statement, we submit, the Commission has twice erred grievously, first in declaring that the undertaking of a common carrier is to be predicated only upon the service actually rendered on and since the "grandfather" date, and, second, by implying that the service actually rendered by appellee on and after the "grandfather" date was limited to the few commodities which it thereupon authorized appellee to transport.

At common law the test of common carriage is the "holding out," and actual performance as to specific commodities is not controlling. Although so firmly imbedded in the body of the common law is this test that citation of authorities hardly seems required, for ready reference we give some few citations in support of our assertion. A common carrier is one whose business, occupation, or regular calling is the carriage of goods for all persons who may choose to employ and remunerate him. *Dwight* v. *Brewster*, 1 Pick. (Mass.) 50; *Sheldon* v. *Robinson*, 7 N. H. 157; *Fish* v. *Chapman*, 2 Ga. 349; *Schouler on Bailments including Carriers*, #269. When he undertakes the general business of carrying every kind of goods, he is bound to carry for all who offer. *Dwight* v. *Brewster, supra; Pomeroy* v. *Donaldson*, 5 Mo. 36; *Hale* v. *Navigation Co.*, 15 Conn. 539. He cannot lawfully reject some goods and afterwards receive and transport others when at the time of refusal there is room for the rejected goods. *Ocean S. S. Co. of Savannah* v. *Supply Co.*, 131 Ga.

831. He is rightfully made responsible on his general undertaking to carry things for reward, even though the trip be his first. *Fuller* v. *Bradley*, 25 Penn. St. 120; *Steele* v. *McTyer*, 31 Ala. 667. The holding out to the public that one is ready to carry things generally, in pursuance of some regular calling, appears to be the prime element that distinguishes the common carrier from the mere private carrier for hire. *Schouler on Bailments including Carriers*, #271.

While it is true that even at common law there can be "limited" or "special" carriage, *Farmers' & Mechanics' Bank* v. *Transp. Co.*, 23 Vt. 186, *Bennett* v. *Dutton*, 10 N. H. 481, that status does not arise because actual performance is limited or special, but because the carrier's holding out or undertaking took on that limitation by affirmative act rather than by implication from previous carriage or lack of it. *Tunnel & Short* v. *Pettijohn*, 2 Harr. (Del.) 48. His business may be restricted within such limits as he may deem expedient, *Honeyman* v. *Oregon & California R. R. Co.*, 13 Oreg. 352, *Dickson* v. *Great Northern Ry. Co.*, 18 Q. B. Div. 176, *Schouler on Bailments including Carriers*, #289, but if he accepts goods not within the line of his business, he assumes the liability of a common carrier as to the specific goods accepted. *New York C. R. Co.* v. *Lockwood*, 17 Wall. 357; *Kimball* v. *R. Co.*, 26 Vt. 248. The restricting of a common carrier to the carriage of particular commodities by governmental fiat was and is unknown to the common law. Incidentally, under Part I of the Interstate Commerce Act the test of common carriage, at least by railroad, is also the common-law test, since the statute expressly directs itself to common carriers by railroad and does not undertake to define the term [U. S. Code, title 49, sec. 1].

While it is true also that part II of the Interstate Commerce Act, by section 203(a)(14), does undertake at least a partial definition of a common carrier by motor vehicle, and while we cheerfully concede that the Commission is bound by that definition as far as it goes and by the "grandfather" clause, all must further agree that beyond that point we

again are bound by the common-law concept of common carriage, namely, the "holding out." Although we have made diligent effort, we have never succeeded in tracking down the real source of these certificates limited to a handful of commodities. This practice by the Commission may have had its genesis in the failure of applicants under the "grandfather" clause, because of their limited knowledge of the law or their lack of foresight, to apply for more than certain specified commodities, or it may have stemmed from the proposition that the definition contained in section 203(a)(14) employs the clause "or any class or classes of property." If it was for the first reason, well and good, for we recognize that the Commission could hardly be criticized for granting to an operator precisely what he asks; but if it was for the second, then we reiterate that the Commission has erred most distressingly. If requests for certificates on commodities generally are pared to a minimum because, despite his holding out, his ability to make it good, and his efforts in furtherance of it, an operator can show *performance* as to certain commodities only, and if that action is bottomed on the proposition that the definition of a common carrier qualifies the word "property" by the expression "or any class or classes of property," then we most earnestly urge that the Commission has given to the qualifying expression a meaning which brings about so unjust a result that it could not have been intended by the Congress. Every act should be construed to carry out the legislative purpose. *Texas & P. Ry Co.* v. *Interstate Commerce Commission*, 162 U. S. 197; *St. Louis & O'Fallon Ry. Co.* v. *United States*, 279 U. S. 461. By what course of construction can the Congress be thought to have intended to drive motor carriers from the fields which they had long occupied?

We firmly believe that what the Congress intended to save by the "grandfather" clause of section 206(a) was the right of an operator to continue to earn a living out of his antecedent occupation. In this concept it seems manifest that the clause contemplates continued *operation* and not the contin-

nous transportation of *particular commodities*. We submit that such an interpretation is both logical and human. As stated by this Court in *United States* v. *Maher*, 307 U. S. 148, 153, "By this legislation Congress responded to the felt need for regulating interstate motor transportation through familiar administrative devices, *while at the same time it satisfied the dictates of fairness by affording sanction for enterprises theretofore established*" (emphasis ours). There being no question at all concerning the purpose of the "grandfather" clause, see how simple it is to visualize a clear field of operation for the expression, "or any class or classes of property," which obviates the necessity of giving that expression the restrictive effect here being given to it by the Commission. The expression, it will be observed, is in the disjunctive in its relation to the general term "property." Also it contains words of "inclusion" and not definitive or restrictive words. The expression is simply meant to make it plain for all to see that the regulation of common carriers by motor vehicle shall embrace "specialty haulers" as well as haulers of every conceivable classification of property under the common law. Under such an interpretation, which is not only reasonable but compelled, the expression has no application and no intendment which would authorize its use in paring an application for commodities *generally* to proof of specific performance as to *particular commodities*. Under it, too, the "grandfather" clause becomes a shield; under the Commission's unhappy interpretation it becomes an engine of destruction.

At page 17 of its brief the Government cites *Slagle Contract Carrier Application*, 2 M. C. C. 127, among others, in support of its assertion that the Commission has consistently taken the view in administering the act that the "grandfather" proviso affords sanction to carriers only with reference to commodities the transportation of which formed a substantial part of their business and to places substantially served by the enterprise. An examination of the decision in question will reveal that it affords no sup-

port whatever for this assertion. In the decision in question, one of the earliest under the act and one of the most thoroughly considered opinions[8] ever rendered by it, the Commission recognized that the operating authority to be granted under the "grandfather" clause is not to be confined to the particular commodities transported if those commodities did not faithfully reflect the undertaking. This is evidenced by the following quotation from page 136 of its report:

> A number of those who filed exceptions to our tentative report made the point that the terms of the certificate should be governed, not by the specific commodities which applicant can show that he has actually hauled in the past, or the specific routes over which he has operated, but by the nature of his undertaking or holding out to the public. Most motor carriers of property have had only a very limited capacity. It is argued that if, for this or similar reasons, the traffic of a carrier happened in the past to be confined to certain particular commodities, its certificate ought not to be so restricted if the carrier actually held itself out to haul commodities generally. *There may be force in this contention.* However, it is clear that a common carrier can lawfully restrict its undertaking to the carriage of specific commodities between specific places and over specific routes. *The evidence here indicates that there was such a restriction in the undertaking of applicant and that its traffic was not so confined as a mere result*

[8] As witness the opening paragraph of the report:

> "Exceptions were filed by protestant rail carriers to the order recommended by the examiner to whom the matter was referred and the case was orally argued. A report expressing our tentative conclusions was issued and all interested persons and public bodies were invited, without formal intervention, to file exceptions to that report. Numerous briefs in opposition to and in support of our tentative conclusions were filed, and we have had the benefit of further oral argument. Our conclusions differ in part from those recommended by the examiner and those expressed in our tentative report."

The Commission does not customarily accord so full an opportunity for exhaustion of a subject.

of circumstances. Our tentative report proposed to restrict the certificate accordingly and no exceptions were filed by applicant. (Emphasis ours.)

In the cited case the Commission did restrict the applicant to specified commodities between specified points over specified routes, but it will be noted that it did so, not because of the limited number of commodities transported by the applicant prior to June 1, 1935, and thereafter, but because the evidence disclosed that *applicant had restricted its undertaking* to the carriage of those very commodities *and no others*, between those very points *and no others*, and over those very routes *and no others*. By failing to file exceptions, moreover, the applicant acquiesced in that finding.

If the Commission had been content to follow the precedent set by the above-quoted portion of its opinion in the *Slagle case* all would have been well for this appellee. This, however, it has not done. Instead, it has renounced that precedent by looking only to the several commodities transported by appellee *as a mere result of circumstances*. And even in doing that, as we shall explain in another chapter, it has ignored much of the testimony of record.

Now let us compare the situation presented by the *Slagle case* with that here presented. There we found a carrier who *himself* restricted his undertaking to the transportation of malt beverages; empty returned beverage containers; canned goods, fresh meats, packinghouse products, and frozen poultry; and agricultural machinery and parts. Seemingly these commodities moved in sufficient volume in both directions to enable him to operate profitably. He needed nothing more to balance his operations and he accordingly undertook nothing more. In the instant case the situation is quite different. The statement of the Government at page 18 of its brief that, "The commercial practice among motor carriers has been that the operations of a particular carrier are limited to * * * the transportation of one or not more than a few identifiable classes of commodities," is utterly contrary to the facts unless the statement is to be accepted as an admission by the United States that

"general commodities" are to be deemed a "class * * * of property" as defined in section 203(a)(14) of the act. We all know that for the years preceding the passage of the act, large numbers of motor carriers operated over irregular routes throughout considerable territories in the carriage of *every commodity which could be hauled in their equipment.* Such a carrier was the appellee. Appellee was in the transportation business within a large number of States. Its desire was to operate profitably. In order to do so it found it necessary—and undertook—to haul in all directions within the territory[9] every commodity which it could obtain from the shippers. As succinctly stated by the witness who was appellee's general manager during a large part of 1934 (R. 60), "anything we could get to haul, we did. We were always looking for more business." (R. 60) Its success is attested by a gradual increase in the number of commodities hauled by it prior to June 1, 1935.

Any notion that appellee restricted itself to a few selected commodities, as did the applicant in the *Slagle case*, will be promptly dispelled by mere mention that among the commodities transported by appellee prior to June 1, 1935, were cotton yarn (R. 115; 136; 155-9), yarn tubing (R. 155), cones (R. 156), skeins (R. 156-8), cotton bedspreads (R. 115; 157), petroleum products (R. 58-9; 93-5; 116-7; 157-8), canned goods (R. 59; 102; 116; 132; 157), medicine (R. 157), batteries (R. 102; 116; 157-8), linoleum rugs (R. 101; 113; 116; 134; 157-8), paper (R. 117; 132, 157), brazil nuts (R. 157), rayon (R. 158), machinery (R. 56-7; 66; 100; 109;

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[9] For added emphasis, we reiterate that in their joint brief in No. 110, *Alton Railroad Company* v. *United States*, appellants here urged that "The fact, too, that Fleming's operations, as evidenced by shipments transported prior to the 'grandfather' date, were shown to have been conducted to certain points in a State only, could not be taken to establish that the operations he was bona fide engaged in were confined to those points * * *." Thus in that case these appellants urge that the term "bona fide operation as a common carrier by motor vehicle" must be construed as embracing service greatly in excess of the actual trips made to the precise points at which deliveries were made, whereas here, under circumstances which differ not one whit in principle, they urge the contrary.

115-7; 157-8), roofing (R. 102; 117; 158), wire (R. 59; 101; 103; 158), nails (R. 103; 158), screen cloth (R. 116; 158), enamelware (R. 158), electrical supplies (R. 158), plumbing supplies (R. 158), tires (R. 44; 58; 99; 115), asbestos products (R. 62; 76-84; 100; 166), cocoa (R. 102; 116; 132), general hardware (R. 102; 116), chemicals (R. 44; 102; 116; 119; 132-3), beer (R. 102; 117), paper containers (R. 117), cotton fabric (R. 57), supplies (R. 58), empty barrels and boxes (R. 58-9), and cotton piece goods (R. 99). How could it be better evidenced that the character of the freight hauled by appellee was the result purely of circumstances and not the result of any restriction in its undertaking?

Experience teaches that seldom can any carrier survive if its loaded movement is wholly in one direction—and then only under most exceptional circumstances. It is axiomatic that a heavy empty movement in any one direction dissipates the profits from the loaded movement in the other. This was perhaps even more true in the days of unregulated, cut-throat competition prior to the "grandfather" date than it is today. These being the conditions confronting appellee, who could dream that it deliberately restricted itself, as the Commission has mistakenly found (R. 10-11), to the carriage southbound of supplies and materials used in the manufacture of asbestos textile products from Harrison and Perth Amboy, N. J., to Charlotte; petroleum products from Sewaren and Marcus Hook to Columbia and Greenville, S. C., and points in North Carolina; linoleum from Paulsboro, Marcus Hook, and East Walpole to points in North Carolina and to Spartanburg and Greenville, S.C.; canned goods from Baltimore to Shelby, N. C.; beer and ale from Newark, N. J., to Gastonia and Wadesboro, N. C.; and roofing and screen wire from York, Pa., to points in North Carolina? It is an insult to the business sagacity of an operator to suppose that it would undertake to haul canned goods from Baltimore to Shelby only, or beer from Newark to Gastonia and Wadesboro only. Mere mention of such an undertaking demonstrates its absurdity! Surely this Court

will agree that the trucking industry did not attain its present prominence by such maladroitness.

Since long prior to the passage of the act many motor carriers have operated over irregular routes between the North and South in just such carriage as that undertaken by this appellee. It is quite conceivable that by reason of changes in the channels of traffic the Commission will ere long be called upon to decide a "grandfather" case in which an irregular-route applicant no longer carries any commodity which it hauled prior to June 1, 1935, or, even more probable, no longer carries any commodities from and to the points between which it carried them prior to June 1, 1935. What then? Will the Commission deny the application in toto? Such a finding would be incredible—and yet such would be the finding if the illiberal course pursued by the Commission in the instant case were to be followed in the hypothetical case which we have just instanced. The effect would be, quite obviously, that the "grandfather" clause, designed by the Congress to protect the operators who had been in business prior to June 1, 1935, would become a death sentence. It is no answer that such a case may never present itself; the principle cannot be altered by blinking at it.

We repeat, then, that such a finding would be simply unthinkable. But, we repeat also, such to a no less damaging degree is the very finding of the Commission here, for it has refused to grant this appellee the right to haul a large number of commodities because since June 1, 1935, it has not continued to haul them with regularity between the exact points from and to which it hauled them before. We feel no hesitancy in voicing the belief that if the Congress had visualized such a state of affairs it would never have placed the stamp of its approval upon the act. It could not have foreseen that regulation might become destruction.

We believe that it will be quite generally conceded that the nature of the undertaking of a given applicant is to be determined from all the circumstances surrounding its operation. Yet here we find the Commission predicating its

decision on the *one* circumstance of the exact commodities regularly carried over a span of years. No weight is given to the fact that appellee's equipment is not designed for the carriage of any special class of commodity, such, for example, as household goods, liquids in bulk, automobiles, or commodities requiring refrigeration, but is adapted to the carriage of practically all package freight. No weight is given to the fact that it carried every type of freight which it could obtain from the shippers. No weight is given to the fact that any other undertaking on its part would have been business suicide. No weight is given to the fact that it did not refuse to haul any freight proffered to it. All these facts are brushed aside in favor of the simpler—even though indefensible—method of counting commodities and points. By its application appellee has already eliminated those commodities and that territory which it did not hold itself out to serve.

Another novel feature of the Commission's decision is its frank substitution, in the definition of a common carrier by motor vehicle in section 203(a)(14), of the words "any commodity or commodities" for the words "any class or classes of property" employed by the Congress. Obviously, the Commission considers the few commodities which it has authorized appellee to haul as being *classes* of property. But if the Congress had had in mind a few specific commodities, would it not have expressed its thought in clear and unmistakable language, rather than to use the generic term it did? The answer is manifestly in the affirmative. Thus we are brought sharply back to the common-sense interpretation which we ask this Court to place upon the definition in section 203(a)(14). Specifically, we urge, the Congress had in mind the natural classes of property which it knew were then in course of transportation by motor vehicle, and in the interest of certitude specifically made the carriers of those classes subject to regulation. The best known of these classes prior to the passage of the act were household goods, heavy machinery, liquid petroleum products, agricultural commodities, new automobiles,

commodities of extreme value customarily carried in armored cars, explosives and other dangerous articles, and commodities requiring refrigeration, to name but a few.

Peculiarly enough, the Commission itself, under the powers vested in it by section 204(c)[10] of the act (U. S. Code, Sup. I, title 49, sec. 304) to establish just and reasonable classifications of groups of carriers included in the term common carrier by motor vehicle, has recognized the reasonableness of the interpretation for which we here pray, for in *Classification of Motor Carriers of Property*, 2 M. C. C. 703, after stating that "our basic purpose has been to ascertain and define generally the *natural divisions which are now present in the industry*" (emphasis ours); it proceeded to group all carriers which haul such commodities as those which it has authorized this appellee to haul, as "carriers of general freight," and to break down all others into groups arrived at by consideration of the type of equipment and special service rendered. Among these last, for example, were "carriers of household goods," "carriers of heavy machinery," "carriers of liquid petroleum products," etc. Notwithstanding that it said also in the decision in question that the classification of carriers was particularly important "in connection with the issuance of certificates," it has here departed abruptly from the classification there made. Nowhere save in its grants of operating authority has it attempted to enforce a distinction between carriage of specific commodities falling within the descrip-

[10] So far as here pertinent, section 204(c) reads as follows:

> The Commission may from time to time establish such just and reasonable classifications of * * * groups of carriers * * * included in the term "common carrier by motor vehicle" * * * as the special nature of the services performed by such carriers * * * shall require; and such just and reasonable rules, regulations, and requirements, consistent with the provisions of this part, to be observed by the carriers * * * so classified or grouped, as the Commission deems necessary or desirable in the public interest.

tion of "general freight." Every commodity transported by this appellee falls within the description of "general freight," but in the eyes of the Commission it is not "general freight." Instead, it is cotton yarn, asbestos textile products, canned goods, beer and ale, and so on!

The Commission Erred as a Matter of Law in Failing to Consider Facts and Circumstances of Record.

Section 206(a) refers to a common carrier in bona fide operation on June 1, 1935, within the territory for which application is made. No hard-and-fast rule is laid down by the Congress for determining the business in which a given carrier was engaged on the date mentioned, and we must look to all the facts and circumstances for the answer. The Commission may not arbitrarily reject evidence which ought to have been considered. *Texas & P. Ry. Co.* v. *Interstate Commerce Commission, supra; Interstate Commerce Commission* v. *Alabama Midland Railway Company*, 168 U. S. 144; *Interstate Commerce Commission* v. *Northern P. Ry. Co.*, 216 U. S. 538. Although in its opinion the lower court did not touch on this phase of our bill of complaint (R. 4) and of our presentation before it, presumably because its decision otherwise made it unnecessary to do so, if the Commission did, as we maintain, fail to consider facts and circumstances of record which ought to have been considered, then its order in the instant case must be set aside for that reason even if for no other.

It is immaterial, of course, that the Commission did not specifically state that it failed to consider all the evidence, for if the failure of the Commission to make such a statement in its report were to be deemed to render ineffectual the powers of the courts, then any administrative tribunal could evade their restraining action by the mere device of a statement that all evidence had been considered, and the courts would become mere subordinates of the administrative tribunals.

It goes without saying that in order to determine in what business a motor carrier was engaged on June 1, 1935, we must look far back of June 1, 1935, if we are to do complete justice to the carrier. This is because of the well known fact that the business done by any carrier is in a constant state of change. The general business done and the commodities hauled may change almost from day to day, as shippers go out of business, or switch their patronage to other carriers, or discontinue shipping to one point and begin shipping to another within the same territory. Present-day emergency conditions caused by the nationwide preparations for all-out war exemplify these uncertainties. Manifestly, since litttle can be learned from an examination of the transportation performed by a given carrier on June 1, 1935, or for any short period prior to that date, the only fair way in which to determine the exact limitations of his operations as of June 1, 1935, is to examine *everything* done over a number of preceding years. Only in this way is it possible to determine the nature of his holding out "in the natural and normal course of business" (*Eucalyptus Wood Co. Common Carrier Application*, 16 M. C. C. 468) and his operation pursuant to that holding out. In no other way, employing the language of this Court in *United States v. Maher, supra*, can the statute possibly satisfy the dictates of fairness by affording sanction for enterprises theretofore established. So logical does this appear that it seems impossible that any tribunal should fail to consider such a revealing period. And yet the Commission has done the exact opposite; instead of inquiring into appellee's operations for a reasonable period of years, it has selected as a starting point some indefinite date in 1934 and has ignored (a) all the evidence regarding shipments transported in 1933, (b) at least some of the testimony in respect to shipments transported in 1934, and (c) the oral testimony adduced in support of the exhibits. Having thus rejected so large a part of the evidence, it is not to be wondered at that the Commission has reached so unfair a conclusion; it was

impossible, indeed, from the evidence which it did consider, to grasp the inherent nature of the service which appellee has accorded from the very beginning of its operations in 1931.

We need not go beyond the Commission's report itself for proof that the Commission considered only a short period prior to June 1, 1935, for on page 306 of its report (R. 8) appears the statement that "An exhibit comprising a list of shipments handled during the period from *1934* to 1936, inclusive, and also a few shipments handled during 1937, was submitted in evidence * * *" (Emphasis ours). As the Court will see, however, the exhibit contains a record of a large number of shipments which moved in *1933*, and many of these consist of commodities for the transportation of which the Commission has not granted this appellee authority. Among the shipments so moving in 1933, for example, are storage batteries from Jersey City, N. J., to Monroe and Raleigh, N. C. (R. 157), paper from New York, N. Y., to Charlotte (R. 157), and brazil nuts from New York to Charlotte (R. 157).

That the Commission likewise literally expunged from the record testimony respecting many of the shipments which moved in 1934 is readily apparent from the fact that it has omitted all mention of them. Among the 1934 shipments appearing in the exhibits which have obviously been excluded from consideration, since no corresponding authority appears in the report of the Commission, are cotton yarn from Belmont, N. C., to Woonsocket, R. I. (R. 155); cotton yarn from Cherryville to Baltimore (R. 157); canned goods from Baltimore to Charlotte and Gastonia (R. 157); medicine from Baltimore to Dallas, N. C. (R. 157); rayon from Lewistown, Pa. to Spindale, N. C. (R. 158); nails from Sparrows Point, Md., to Monroe, N. C. (R. 158); wire, plumbing supplies, and enamelware from Baltimore to Monroe (R. 158); and electrical supplies and batteries from Jersey City to Monroe (R. 158). When we couple this partial list of disregarded shipments with what we have al-

ready said about the year 1933 and with what we shall say in a moment about the oral testimony of our witnesses, we believe that the Court will agree that an imposing array of testimony has received no consideration whatsoever.

As explained in the record and mentioned in the report of the Commission (R. 8; 137; 141), many of the records of the appellee had not been preserved and were therefore not available for use in compiling exhibits. Under those circumstances appellee quite properly supplemented the documentary evidence with the oral testimony of those who had been familiar with the early operations. Yet that testimony has been lightly dismissed. May we interject the thought that the Congress was quite familiar with the fact that many of the motor carriers did not maintain careful records—or even any at all—prior to the passage of the act, and that oral testimony would become necessary in perhaps hundreds of cases?

We turn now to the testimony of the aforementioned witnesses. Witness Mauney, who drove for appellee from 1931 until shortly before the hearing, testified to the following carriage prior to June 1, 1935: Cotton yarn from numerous North Carolina points to Norwich and Danielson, Conn., Northampton, Franklin, Brockton, and Lowell, Mass., and West Warwick, R. I. (R. 115); automobile tires from Charlotte to Plainfield and Newark, N. J., and New York (R. 115); bedspreads from Lincolnton, N. C., to Washington, D. C., and Baltimore (R. 115); machinery from Altavista, Va., to Lincolnton and from Raleigh, N. C., to Rock Hill and Wellford, S. C. (R. 115); motors and a machine from New York to Ranlo, N. C. (R. 116); cocoa from New York to Charlotte (R. 116); canned goods from Baltimore to Charlotte (R. 116); batteries from Jersey City to Richmond and South Hill, Va., and Raleigh and Monroe (R. 116); general hardware from Baltimore to Monroe (R. 116); chemicals from Linden and Woodbridge, N. J., to Charlotte and from Woodbridge to Kannapolis, N. C. (R. 116); chemicals from Camden, N. J., and Philadelphia, Pa., to Burlington and

Charlotte (R. 119); oil from Sewaren, N. J., to Danville, Va., and from Marcus Hook, Pa., to Spartanburg, S. C. (R. 116-7); beer from Newark, N. J., to Hickory, N. C. (R. 117); paper from New York to Cramerton, N. C. (R. 117); machinery from Philadelphia to Valdese, N. C. (R. 117); and paper containers from Philadelphia to Clover, S. C. (R. 117). This witness testified also that between the beginning of his employment and June 1, 1935, appellee gradually served more points and hauled more commodities (R. 118) and that since that time there had been no change in appellee's operations (R. 120).

Witness Hudson, who solicited freight for carriage by appellee, stated that prior to June 1, 1935, appellee's territory gradually broadened until it embraced "quite a radius" and that between the North and the Carolinas appellee handled a monthly average of twenty loads which he himself solicited (R. 141). This was in addition to the other traffic transported by appellee.

We invite the particular attention of the Court to the testimony of witness Griffis, traffic manager of the Southern Asbestos Company, of Charlotte, who introduced in evidence an exhibit showing a few of the points to which appellee had hauled the products of his company, but testified further that the tabulation was by no means complete, since his company shipped generally along the Atlantic Seaboard and into the New England States. Specifically he mentioned, in addition to the points for which the Commission has granted operating authority, Baltimore, Md., Hartford and New Haven, Conn., and Worcester, Mass. (R. 77). And yet the Commission states (R. 9) that "the only points shown to have been served in the transportation of its products from Charlotte are Philadelphia and North Wales, Pa., Trenton, Newark, Passaic, and Patterson, N. J., New York, Middletown, Conn., Providence and Pawtucket, and Boston and Hudson, Mass. * * *"

Witness Sullivan, who drove for appellee during parts of 1933 and from March until September, 1934 (R. 56), testi-

fied to the following transportation which the Commission has entirely thrown out of consideration: Textile machinery from Altavista, Va., to Lincolnton, South Side, and Long Shoals, N. C., and looms from Salisbury, N. C., to Rock Hill and Spartanburg, S. C., and from Charlotte to Chester, S. C. (R. 56-7); cotton yarn from Clover, S. C., to Chester and Conshohocken, Pa. (R. 57); cotton fabric from McColl, S. C., to Conshohocken (R. 57); tires from Charlotte to Boston and Lawrence, Mass., and New York (R. 58); and canned goods from Baltimore to Charlotte, Gastonia, Albemarle, Sanford, and Shelby, N. C., and from Frederick, Md., to Charlotte (R. 59).

Witness Dellinger, who drove for appellee from March, 1931, until long after June 1, 1935 (R. 98), likewise testified to the carriage of numerous shipments prior to June 1, 1935, which the Commission did not choose to consider. Among these are cotton-mill products from Clover, S. C., to many destinations throughout the East, including Wilmington, Del. (R. 99); tires from Charlotte to New York, Boston, and Lawrence (R. 99-100); textile machinery from Altavista, Va., to Lincolnton, N. C., from Salisbury, N. C., to Rock Hill, S. C., and from Kershaw, S. C., to Cherryville (R. 100); tire fabric from McColl, S. C., to Conshohocken (R. 100); petroleum products from Sewaren to Florence and Spartanburg (R. 101); chemicals from New York, Brooklyn, Woodbridge, and Camden to Kannapolis, N. C., and Abbeville, S. C. (R. 102); beer from Newark and Baltimore to Gastonia, Wadesboro, and Hickory (R. 102); batteries from Jersey City to Richmond, Raleigh, and Monroe (R. 102); canned goods from Swedesboro, N. J., and Baltimore to Charlotte, Albemarle, and Sanford, N. C. (R. 102); cocoa from New York to Charlotte (R. 102); hardware from Baltimore to Monroe (R. 102); shotgun shells from Bridgeport and New Haven, Conn., to Charlotte (R. 102); and nails and baling wire from Sparrows Point, Md., to Charlotte and Shelby (R. 103).

Not only did the Commission cast aside as worthless the convincing testimony of these witnesses, but it even went so

far as to spurn in part the documentary evidence for the first five months of 1935. For example, the Court will note from Exhibit 1 that the Commission gave no weight at all to the following shipments, among others, during that period: Cotton yarn from Belmont to Coventry, R. I., Easthampton, Mass., and Danielson and Stonington, Conn. (R. 155); quiller machines from Fall River, Mass., to Cherryville (R. 157); petroleum lubricating oils from Sewaren to Gaffney, S. C. (R. 157); canned goods from Baltimore to Charlotte (R. 157); machines from Philadelphia to Valdese (R. 158); air compressor from Philadelphia to Cherryville (R. 158); and petroleum products from Sewaren to Spartanburg, Gaffney, and Florence, S. C. (R. 158; 162). No explanation for this omission, or for the omission of the aforementioned 1934 shipments, appears in the report, unless it be the statement that "the commodities shown to have been handled with a degree of regularity both prior to and since June 1, 1935," are those thereafter specified. We have already discussed the nature of appellee's business through the years; at this point we content ourselves with the bare observation that only a complete misconception of the requirements of common carriage could demand that a motor carrier transport subsequently to June 1, 1935, each and every commodity which it transported prior to that date, and between precisely the same points, if it is to receive authority for their carriage.

The Commission Erred as a Matter of Law in Basing Its Decision on Considerations Which Have No Relevancy.

At pages 308 and 309 of its report (R. 10) the Commission had the following to say:

> Furthermore, we have frequently stated that authority to transport general commodities throughout a wide territory, over irregular and unspecified routes, pursuant to the "grandfather" clauses of the act, should be granted to a carrier only when such carrier's right thereto has been proved by substantial evidence. To do otherwise would create the very ills which regulation is

designed to alleviate, namely, congestion of highways, destructive rate practices, and unbridled competition. Common carriers which are expected to maintain regular service for the movement of freight in whatever quantity offered, to and from all points on a specified route, cannot operate economically and efficiently if other carriers are permitted to invade such routes for the sole purpose of handling the cream of the traffic available thereon in so-called irregular-route service.

Strangely enough, the Commission has first rejected the substantial evidence introduced by appellee and has then proceeded to disparage its supposed lack. By what tenuous reasoning it could justify this course must forever remain obscure, but whatever it may have been, that course is so prejudicial to appellee as to demand the condemnation of this Court, just as it drew the censure of the lower court (R. 24; 33). First and most significant is the fact that there is not one word of testimony in the record to indicate that the granting of the rights prayed by appellee would create any congestion of the highways whatsoever, would create any destructive rate practices whatsoever, or would create any unbridled competition whatsoever, and neither is there any testimony that this appellee would invade the routes of the regular-route operators for the sole purpose of handling the cream of the traffic. The Commission has simply drawn on its imagination in the most damaging way to this appellee; by a series of what are no more than flimsy catch-phrases it has attempted to bolster up a finding which is entirely lacking in factual or legal basis. Cases before the Commission should not be won or lost by the Commission's deftness in phrase-making. They should turn on a thoughtful application of the law to the unvarnished facts of record. The lower court quite properly recognized that the instant case did *not* turn on such an application.

The second damaging aspect of the above-quoted portion of the decision is that it hinges upon considerations which have no place in a case brought under the "grandfather" clause. We challenge anyone to find anywhere in

the act a single word or phrase which indicates that any one of the considerations in question shall come into play in a "grandfather" application. To the contrary, dealing seriatim with these considerations, we find that section 208(a)[11] [U. S. Code, Sup. I, title 49, sec. 308] very definitely prohibits the Commission from restricting the right of a carrier to add to its equipment anywhere within its territory; that section 216[12] [U. S. Code, Sup. I, title 49, sec. 308] gives the Commission full authority to fix the minimum rates and charges of motor carriers and thus to prevent destructive rate practices; and that the section just mentioned and others designed for the same purpose vest in the Commission such authority as may properly be exercised over competition. Is it to be thought that the Commission may deny operating authority under the "grandfather" clause to two carriers, let us say, in the same territory, merely because a grant of such authority could result in keen and perhaps unbridled competition? Such a thought is utterly fantastic, as the Commission would no doubt be the first to concede if the question were so posed to it. Yet that is the very thing which it has done here!

In going beyond the one question whether appellee was in bona fide operation as a motor common carrier of general commodities on June 1, 1935, within the territory for which application is made, and whether it has so operated since, the Commission has been palpably guilty of indulging in pure conjecture and of considering circumstances which could not legally influence its conclusion. For such prejudicial error the order of an administrative tribunal must be set aside. See concurring expression of Mr. Justice Brandeis in *St. Joseph Stock Yards Co.* v. *United States*, 298 U. S. 38, and cases therein cited at page 75.

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[11] See page 56 of the Commission's brief.

[12] So far as here pertinent, section 216 is set forth in the appendix hereto, *infra*, page 40. The Commission has frequently exercised this power to prescribe minimum bases of rates. See, for example, *New England Motor Carrier Rates*, 27 M. C. C. 1, and the prior reports therein cited.

It is no answer to state, as does the Commission at page 49 of its brief, that "If authority were granted to a carrier, pursuant to the grandfather clause, to operate over irregular and unspecified routes for the transportation of general commodities throughout a wide territory, without proof by substantial evidence of their right thereto, such carriers would thereby obtain official sanction to invade the regular routes to obtain the cream of the traffic available thereon in so-called regular-route service." As well find that corresponding authority granted to a regular-route carrier under the "grandfather" clause would accord it official sanction to transport the cream of the traffic carried at times by an irregular-route carrier! The decisions of the Commission will be searched in vain for an example of such solicitude for the irregular-route carriers. Incidentally, the Commission does not voice an opinion as to just how this invasion would be accomplished. Most assuredly, bearing in mind the provisions of section 216(g), *infra*, page 40, it should not be through the medium of rates reduced to an unreasonable level.

Neither is it any answer (page 16 of the Government's brief) that "A construction which effected any other result [than the destruction of appellee's business effected by the Commission] would largely frustrate the regulatory purpose of the statute." What regulatory purpose, pray? Observe how carefully the Government avoids an exposition of the respects in which that purpose would be frustrated. Here we have merely another example of the manner in which by vague generalities appellants seek to becloud the real issues. How can the granting of authority to an operator to continuine in its antecedent occupation frustrate any purpose of the statute? Manifestly, it cannot. And we repeat that the purposes which the Government must have in mind, as expressed in section 202(a) of the act (quoted at page 31 of the Government's brief), are met in every respect by sections of the statute specifically designed to accomplish them.

The Loving Case Furnishes No Precedent.

At pages 10 to 15 of the Government's brief and at pages 16-19 of the Commission's brief it is urged that decision of the instant case is controlled by *Loving* v. *United States*, 32 Fed. Supp. 464, affirmed *per curiam*, 310 U. S. 609. Those proceedings grew out of *Loving Common Carrier Application*, 12 M. C. C. 571, wherein the Commission, acting under the "grandfather" clause, authorized the applicants to transport specified commodities over irregular routes between all points in Oklahoma, on the one hand, and points in Colorado on and east of U. S. Highway 87, on the other hand. U. S. Highway 87 extends from Raton, N. Mex., on the south, through Trinidad, Pueblo, Colorado Springs, and Denver, Colo., to Cheyenne, Wyo.

A brief review of the facts will demonstrate that the *Loving case* does not afford a sound precedent for decision here. Bearing in mind that the applicants there operated but one truck on and before the "grandfather" date, it is significant that they first filed an application for authority to transport general commodities throughout the length and breadth of the ten States of Mississippi, Louisiana, Arkansas, Missouri, Oklahoma, Texas, Colorado, Wyoming, Arizona, and California—a veritable empire. In an amendment filed nearly a year later they added to their claim, as an afterthought, the States of Kansas and New Mexico, increasing the total States to twelve, an area of more than one and one-quarter million square miles. At the hearing before the Commission they reduced their claim to five western States, namely Oklahoma, Kansas, Texas, Colorado, and New Mexico. The original claim and the subsequent amendment prove the impossibility of the claimed holding out, and, indeed, demonstrate that applicants themselves had no conception of the extent of their holding out. It is a fair inference that in their one truck they merely roamed gypsy-fashion through the West and Southwest, transporting only when the spirit or the need for income moved them to it. The claimed holding out was ludicrous, of course;

the number of long-haul trips which could be made from one end of this territory to the other in a period of months would be so few as to be negligible. Confronted with such an absurd application, and furnished with virtually no proof, what could the Commission do but exercise its best judgment on the actual carriage as constituting the true undertaking, and what could the Court do but refuse to substitute its judgment for that of the Commission?

The entire evidence of transportation dealt with a total of thirty shipments prior to June 1, 1935, throughout the vast claimed area. Of these thirty shipments, twenty-three originated at or were destined to Oklahoma City, Okla., or Denver, Colo. The remaining seven consisted of shipments from Denver to Liberal, Kansas., from Lawrence, Kans., to Tulsa, Okla., from Chickasha, Okla., to Greeley and Alt, Colo., from Colorado Springs, Colo., to Duncan, Okla., from Oklahoma City to Fort Collins and Eaton, Colo., and from or to Texas points. No shipments to or from Texas were transported subsequently to June 1, 1935. Obviously, applicants' ability to serve and their actual operations were not consistent with their preposterous alleged holding out. Yet, may the Court please, the Commission, in consideration of evidence of six points in Colorado and four in Oklahoma, authorized these applicants to transport between all of Oklahoma and the more important half of Colorado.

If the same liberality had been shown in the instant case appellee would most certainly now be authorized to transport general commodities throughout the whole of its claimed territory. Here we have a territory which, though important, is relatively small and rapidly traveled. Here we have a considerable number of vehicles at all times in operation. Here we have a wide variety of traffic transported between places scattered over the whole of the claimed territory. Here we have testimony which proves that the undertaking of appellee could only have been that which it claims, unless we attribute to it a strange perversity of purpose. An operation of this scope cannot be compared

with the nomadic wanderings of the applicants in the *Loving case*. A contrast, yes; but a comparison, no!

The Eastern Carrier Corporation Case Turned on the Lack of Evidence Before the Court.

Appellants endeavor likewise to make much (page 15 of the Government's brief and pages 35-6 of the Commission's brief) of *Eastern Carrier Corp.* v. *United States*, 31 Fed. Supp. 232, which dealt with the Commission's decision in *Eastern Carrier Corp. Common Carrier Application*, 14 M. C. C. 430. They contend that the District Court upheld the Commission's construction of the statute. But see the following excerpts from page 238 of the decision of the District Court:

> We entertain no doubt that the Commission under the A has the power to restrict the plaintiff *to the type of service it was performing on June 1, 1935*, not only a to the routes operated but also as to the class of commodities which it carried. * * * It was obviously the intention of Congress by the enactment of the grandfather clause to preserve to the carrier its right to transport commodities or articles in commerce of the kind which it was transporting on June 1, 1935. *If the plaintiff's predecessor was engaged in the bona fide transportation of merchandise generally at the grandfather date and this transportation was carried on by the plaintiff thereafter, a certificate of public convenience and necessity should have been granted by the Commission.* * * *
>
> The question therefore becomes one of fact and we may not overrule the Commission's findings in this connection unless we find them to be arbitrary or capricious or not supported by substantial evidence.
>
> *Examination shows that a substantial part of the record which was before the Commission is not before this court.* (Emphasis ours)

We wholeheartedly concur in the above-quoted portions of the decision. We ask only that what was there said be applied to the facts of the instant case, for, in the language of the District Court, appellee's predecessor was engaged

in the bona fide transportation of merchandise generally at the "grandfather" date, this transportation was carried on by appellee thereafter, and a certificate of public convenience and necessity to continue that transportation should have been granted by the Commission.

It is true that the District Court went on to say that a tabulation of record led to the conclusion that the transportation of general merchandise by the plaintiff and its predecessor was sporadic and entirely incidental to its chief business, but we are still quite unable to find any similarity between the facts thought to support that dictum (we say "dictum" because the entire record was not before the District Court and it could not logically assess the weight of that record) and the facts in the case here at bar. No unprejudiced person could for a moment believe that the carriage of the many commodities omitted from the Commission's findings in the instant case was incidental to this appellee's business, and certainly the carriage of those commodities was no more incidental than the carriage of commodities which the Commission did authorize, such, for example, as canned goods from Baltimore, Md., to Shelby, N. C., beer from Newark, N. J., to Wadesboro, N. C., and linoleum from Marcus Hook, Pa., to Spartanburg, S. C.

The McDonald Case is Not in Point.

At pages 25 and 26 of its brief the Government looks to *McDonald* v. *Thompson*, 305 U. S. 263, for support for its position that "the true criterion is whether an applicant has in substance *actually* been engaged in carrying general freight throughout the territory specified" and that that standard "requires that general transportation and service have been in fact performed as the stable and distinguishing feature of the applicant's business." But the cited case is clearly not even remotely in point here. The petitioner in that case had operated in open defiance of the State laws of Texas, and the decision turned wholly on the question whether, despite such open defiance, the opera-

tions were bona fide within the meaning of the "grandfather" clause. That this is a correct analysis is plain from beginning to end of the decision, but for the convenience of the Court we quote the following from pages 266 and 267:

> Plainly the proviso [the "grandfather" clause] does not extend to one operating as a common carrier on public highways of a State in defiance of its laws.
>
> As petitioner is not protected in its operation as a common carrier by the proviso, we need not consider to what extent, if at all, the the federal Motor Carrier Act superseded the state motor truck law, *or any other question presented by petitioner.* (Emphasis ours)

The Government, however, at page 26 of its brief, quotes the following language from the opinion of the Court:

> • • • The expression, "in bona fide operation," suggests absence of evasion, *excludes the idea that mere ability to serve as a common carrier is enough, includes actual rather than potential or simulated service,* and in context implies recognition of the power of the State to withhold or condition the use of its highways in the business of transportation for hire. • • • (Italics supplied by the Government.)

This language it ostensibly accepts as the equivalent of a finding that this appellee may not be authorized to transport general commodities within the territory which it has so long occupied. From which particular part of this excerpt it draws comfort we cannot say, for there is nothing therein which weakens our position in the slighest. In the instant case, as in the standard established by this Court in the cited case, we have a complete absence of evasion and we have a coincidence of ability to serve as a common carrier and actual rather than potential or simulated service. Thus appellee's operations fall squarely within the descriptive matter which the Government has selected from the decision of the Court. We cannot believe that the Government will seriously urge that this appellee ever attempted to operate by stealth or artifice or that its service has been merely potential or feigned.

The Lower Court Did Not Substitute Its Judgment for that of the Commission on the Weight of the Evidence.

The Commission, at pages 15 and 38-46 of its brief, charges the lower court with trenching upon the administrative functions of the Commission. In this the Commission clearly errs. This is best shown perhaps by the fact that the court below did not attempt to define the precise limitations of the certificate to which appellee might be entitled, but ordered the cause remanded "to the end that the Commission may pass upon the application of plaintiff in the light of the principles herein set forth." It specifically stated that this did not mean that appellee was necessarily entitled to the certificate applied for, but that "the Commission should pass upon the application in the light of the principles here laid down, and without the limitations which we have condemned."

The whole opinion of the court below demonstrates that it did not, as the Commission charges, assume to weigh the evidence. To the contrary, it did not go beyond the question of the construction to be placed upon the statute. Having found that the clear meaning of section 206(a) is to ensure to common carriers in business on June 1, 1935, and since, the right to continue to occupy the same field which they had theretofore occupied, having found that "There is nothing in the language or in the reason and spirit of the Act which justifies the limiting of certificates granted common carriers under the grandfather clause to the precise commodities which they have theretofore hauled or in the case of carriers by irregular routes to the precise points that they have served in the territory over which they have operated," and having found that the Commission, by drawing an unwarranted distinction between common carriers by regular and those by irregular routes, had added to the statute in favor of one class of carriers and against another, the court went no farther than to order the cause remanded. Here, of course, it had no alternative, since the limitations imposed by the Commission flew in the very face of the compelled

construction of the statute and were therefore so arbitrary and unreasonable as to transcend the Commission's power. A vast number of precedents could be cited in support of the proposition that orders of the Commission must be set aside if they are the result of giving to the statute a meaning different from that plainly intended by the Congress. *United States* v. *Pennsylvania R. Co.*, 242 U. S. 208; *Baltimore & O. R. Co.* v. *United States*, 277 U. S. 291; *Interstate Com. Com.* v. *Oregon-Wash. R. & Nav. Co.*, 288 U. S. 14.

CONCLUSION.

We are firmly convinced that the conclusions of the Commission stem from a mistaken construction of the "grandfather" clause and of section 203(a)(14) and that because of that mistaken construction the Commission has arbitrarily disregarded evidence which ought to have been considered and has considered other facts and circumstances, not of record, which should never have been injected into the proceeding. For these reasons appellee respectfully submits that the decree of the District Court is wholly sound and should therefore be affirmed.

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January 6, 1942.

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing brief upon all parties of record by mailing a copy thereof, properly addressed with postage prepaid, to each of said parties.

Dated at Washington, D. C., this sixth day of January, A. D. 1942.

WILMER A. HILL,
For appellee.

APPENDIX.

Pertinent Portions of Section 216 of Part II of the Interstate Commerce Act.

(b) It shall be the duty of every common carrier of property by motor vehicle to * * * establish, observe, and enforce just and reasonable rates, charges, and classifications, and just and reasonable regulations and practices relating thereto and to the manner and method of presenting, marking, packing, and delivering property for transportation, the facilities for transportation, and all other matters relating to or connected with the transportation of property in interstate or foreign commerce.

(e) * * * Whenever, after hearing, upon complaint or in an investigation on its own initiative, the Commission shall be of the opinion that any individual or joint rate, fare, or charge, demanded, charged, or collected by any common carrier or carriers by motor vehicle or by any common carrier or carriers by motor vehicle in conjunction with any common carrier or carriers by railroad and/or express, and/or water for transportation in interstate or foreign commerce, or any classification, rule, regulation, or practice whatsoever of such carrier or carriers affecting such rate, fare, or charge or the value of the service thereunder, is or will be unjust or unreasonable, or unjustly discriminatory or unduly preferential or unduly prejudicial, it shall determine and prescribe the lawful rate, fare, or charge or the maximum or minimum, or maximum and minimum rate, fare, or charge thereafter to be observed, or the lawful classification, rule, regulation, or practice thereafter to be made effective * * *.

(g) Whenever there shall be filed with the Commission any schedule stating a new individual or joint rate, fare, charge, or classification for the transportation of passengers or property by a common carrier or carriers by motor vehicle, or by any such carrier or carriers in conjunction with a common carrier or carriers by railroad and/or express, and/or water in interstate or foreign commerce, or any rule, regulation, or practice affecting such rate, fare, or charge, or the value of the service thereunder, the Commission is hereby authorized and empowered upon complaint of any interested party or upon its own initiative at once and, if it so orders, without answer or other formal pleading by the interested carrier or carriers, but upon reasonable notice, to en-

ter upon a hearing concerning the lawfulness of such rate, fare, or charge, or such rule, regulation, or practice, and pending such hearing and the decision thereon the Commission, by filing with such schedule and delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, fare, or charge, or such rule, regulation, or practice, for a period of ninety days and if the proceeding has not been concluded and a final order made within such period the Commission may, from time to time, extend the period of suspension by order, but not for a longer period in the aggregate than one hundred and eighty days beyond the time when it would otherwise go into effect; and after hearing, whether completed before or after the rate, fare, charge, classification, rule, regulation, or practice goes into effect, the Commission may make such order with reference thereto as would be proper in a proceeding instituted after it had become effective. * * *